Office-Supreme Court, U.S.
FILED
DEC 23 1982
STEVAS,
CLERK

No. 82-733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PULLMAN STANDARD, INCORPORATED
Petitioner,
v.
LOUIS PINKARD,
Respondent.

REPLY BRIEF FOR PETITIONER

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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Respondent's Brief (p. 1-2) understandably minimizes this case and characterizes the Court of Appeals' indulgence in fact finding as "a routine and proper application of Rule 52." The dissenting Judge, Lynne, says (Res. App. 87a-88a) it "is the product of the court's improper independent consideration of the totality of the circumstances found in the record . . .[,] precisely the historical practice of the former Fifth Circuit condemned by the Supreme Court in *Pullman-Standard* v. *Swint*, 456 U.S. ____ . . . (1982)"; that it "proceeds to resolve conflicts in the record evidence, to draw its own inferences and to make credibility choices. . . ." Even the majority of the Court of Appeals recognizes that such indulgence is contrary to the *Swint* decision but for the distinction it purports to make, *viz:* that *Swint's* strictures apply only to (Pet. App. 87a)—

> "(1) resolving in the first instance a factual dispute which had not been considered by the district court

> and (2) failing to remand where findings are infirm because of an erroneous view of the law and the record permits two or more resolutions of the factual issue."

Respondent does not address his brief to our arguments (Petition, 14-17) that this distinction is incorrect in point of both fact and law; but according to any rational approach there is nothing routine about this fact-finding process except in the sense that it was indeed the "historical practice of the former Fifth Circuit" condemned in *Swint* and will no doubt again become the routine way of dispensing justice in this Circuit, as it had become pre-*Swint*, unless the petition is granted and the decision reversed. Respondent argues (Brief, 5) that all members of the panel were well aware of *Swint* "which expressly rejected the proposition that appellate courts could engage in 'independent fact finding' as to 'ultimate facts.' " Buy why on earth did the majority even attempt to *distinguish Swint* except to justify its substituting its own finding of fact for the District Court's as to whether Mr. Pinkard was discharged for lawful advocacy of minority and union rights? Of course the panel was well aware of the *Swint* holding; the difference between the majority and the minority is that the former declared its strictures on independent fact finding limited to two narrow categories of cases, a point which is ignored by Respondent's Brief.

Further, Respondent seeks to belittle the case as unworthy of due process by saying (Brief 6) "only a single black employee will be effected" [sic]. As if to say, the former Fifth Circuit's historial practice should continue undiminished in one-on-one situations; and *Swint* should prevail only in bigger cases, perhaps class actions. What an egregious sugggestion! Mr. Pinkard's case began as a class action for a putative class of hundreds and wound up

at trial with four plaintiffs' presenting 12 claims for relief. If the idea is that the Court of Appeals should be permitted to rule contrary to this Court so long as it does so in only one claim out of 12, surely such an arbitrary principle would be contrary to the constitutional integrity of this Court. Respondent's Brief (p.7) ignores the rationale of the majority below including both its finding that Pinkard was guilty of misconduct meriting some discipline (Pet. App. 79a, 86a); and the process of balancing his militance against his misconduct in weighing the appropriateness of the degree of discipline imposed. It urges yet another factual scenario (omitting any consideration of misconduct), saying (Brief, 7):

> ". . . Pullman Standard's attitude towards Pinkard changed markedly when he was chosen one of the few[1] black union officials at the company's plant. Prior to that time Pinkard had an exemplary disciplinary record;[2] thereafter his supervisor repeatedly objected to his efforts on behalf of his fellow work-

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[1] *Sic;* it is undisputed that ever since 1941 approximately one-half the Steelworkers Union officers and over half the stewards have been black. There have been literally hundreds of them. *Swint* v. *Pullman-Standard,* 17 FEP Cases 730, 735, 738 (N.D.Ala., 1978):

"It is not without significance that blacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeemen and negotiators. . . .

". . . In 1954, as was true in 1941 and the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formation of the policies and positions of the union—the local not being dominated by whites."

These findings have been undisturbed and unquestioned in the subsequent proceedings in that case.

[2] Another way of stating this is that he seldom or never committed any disciplinary infractions until then.

> ers.[3] . . . [T]he record compels the conclusion that Pinkard's dismissal was in retaliation for these activities."

On the contrary, the record shows without question that Mr. Pinkard's misconduct, including the wildcat strike, constantly going outside the grievance procedure, his calling foreman Dave Mason without justification a liar, and his insubordinate refusal to report to a disciplinary interview, coincided in time with the period after he became a union steward; and so the time factor is wholly consistent and equally referrable to the company's articulation of why it fired him. As pointed out in our Petition (p. 12-13) there was direct testimony of the reason for his discharge and such testimony cannot be arbitrarily disregarded as the majority below and Respondent would have it disregarded. It is a pure question of credibility whether the direct evidence has been overcome by the circumstantial argument of Mr. Pinkard; and certainly nothing compelled the District Court or the Arbitrator either to a conclusion or credibility finding opposite to the one they reached. Respondent's brief simply misstates the facts in the record, omits others, and says they compelled a finding in Pinkard's favor. In other words, it argues that no reasonable person could conclude on this record that Pinkard was fired for the reasons the direct testimony said he was, although Arbitrator Whyte, District Judge Guin, and dissenting Judge Lynne did all so conclude; therefore, Respondent necessarily argues that none of them is a reasonable man.

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[3] True, but only in those frequent instances where his efforts involved engaging in a wildcat strike (Pet. App. 41a), bypassing the contractual grievance procedure (Pet. App. 19a, 48a-49a), or other unprotected activities. There was no competent evidence that any objection was ever made to his protected or privileged advocacy activities.

Respondent's Brief (p.5) says we "point to no passage in the opinion below announcing or utilizing" a "standard . . . permitting appellate courts to engage in 'independent fact finding.' " We believe both Judge Lynne's dissent (Pet. App. 87a-88a) and our Petition, *passim*, certainly does this, but any omission in that regard is supplied by Respondent's own observation (p.7) that:

> "*As the Court of appeals' opinion persuasively demonstrates*, the record compels the conclusion *that Pinkard's dismissal was in retaliation* for these activities." [Emphasis supplied.]

I.e., the District Court found as a fact it was not retaliatory, but the Court of Appeals majority found as a fact that it was; the "passage in the opinion below" utilizing the independent fact finding standard is precisely that to which Respondent here refers. Instead of affirming or remanding for fact finding, the majority assumed that function independently of the District Court. So it is bizarre to say petitioner has insufficiently pointed out the exact passage wherein the Court of Appeals majority indulged in independent fact-finding when Respondent's brief itself points out that is what the majority below did, as a matter of actual fact.

Respondent's brief neither defends nor even mentions the majority's attempted distinction of *Swint*. It does not offer its own distinction of *Swint* either. Perhaps it argues it is enough that the Court of Appeals obey Rule 52 in form, that is by reciting the formula that the record leaves them with a firm conviction that a mistake has been made and so a finding is clearly erroneous, without abiding by its substance, that is by actually leaving genuine disputes of credibility and fact up to the trier of fact to resolve. If that is Respondent's contention, it is contrary to this Court's post-*Swint* decision in *White-*

Wilson Medical Clinic v. *Robbins*, ____ U.S. ____, 102 S.Ct. 2229, 72 L.Ed 2d 842 (1982), where the same Circuit followed the ritual but not the substance of Rule 52 in an indistinguishable context, and this Court reversed.

Decisions of this Court never affect just one person. If left unreviewed, the result of the decision below will undoubtedly be general resumption of the historical practice condemned in *Swint* with at best on occasional ritualistic formula to justify substituting appellate findings of fact for the trial court's on genuinely disputed questions of fact as was done in this case. Incalculable damage would be done to the administration of justice if that historical practice is resumed. Every losing party in a factual case, having a de novo shot at the facts, would be foolish not to appeal, particularly if he thought there were any propensity of the appellate judges to favor his type of case. Not only would this burden the judicial system, it makes it a farce for judges who have heard lawyers' argument for 30 minutes to assume an understanding of the facts and credibility of witnesses superior to that of judges who have heard live witnesses for days. It certainly will foster the public impression that this is not truly a government of laws, but of men. Belief in the fundamental fairness of the judicial system is an essential condition to the preservation of liberty. The case is an important one deserving review by this Court because the historical practice of the Eleventh and former Fifth Circuits, which was here resumed despite *Swint*, will continue to affect the lives and fortunes of millions, investment decisions and prosperity of an entire region.

As for Respondent's suggestion that the question of whether an action for retaliation lies under § 1981 (Brief p. 10-11) was not sufficiently raised in the Court of Appeals, it should be noted that (1) a question of jurisdic-

tion over the subject matter which this certainly was may be raised at any time and cannot be waived in a federal court; (2) petitioner did raise the jurisdictional question both in its answer and its brief on appeal, as conceded in Respondent's brief, p. 10; and (3) petitioner raised it once again in its petition for rehearing in the Court of Appeals, and called express attention in connection with this jurisdictional question to *General Contractors Ass'n.* v. *Pennsylvania*, ____ U.S. ____, 102 S.Ct. 141, 73 L.3d.2d 835 (June 29, 1982), which was decided in the interval between the decision below (June 10, 1982) and the petition for rehearing, which was denied without opinion on August 31, 1982. Certainly the question was adequately raised, and in no aspect has ever been abandoned.[4]

The impossibility of reconciling the decision below with the *Swint* case is perfectly evident on the face of the petition, the appendix thereto, and Respondent's Brief in Opposition (which clearly admits the majority below substituted its finding of ultimate fact for the District

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[4] Compare Respondent's Brief, p. 10, "an argument long ago abandoned" with Petition p. 25, 26, n. 16. The arbitration award was made on October 15, 1976 (Pet. App. 37a), many months after the answer was filed; consequently the form of the argument, but not its substance, has changed slightly.

Court's, saying this was "compelled"); therefore, it would certainly not be inappropriate if this Court dispensed with briefs and oral argument, granted the writ and reversed summarily much as it did in *White-Wilson Medical Clinic* v. *Robbins*, ___ U.S. ___, 102 S.Ct. 2229, 72 L.Ed.2d 842 (1982).

Respectfully submitted,

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